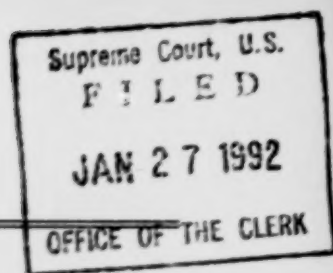


(2)

No. 91-833



In The
Supreme Court of the United States
October Term, 1991

GERALD J. CROWLEY,

Petitioner,

v.

BARNETT BANK OF PASCO COUNTY,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

DID THE ELEVENTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR WITH RULE 4(a)(2), FEDERAL RULES OF APPELLATE PROCEDURE?

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STATEMENT OF THE CASE

Respondent, Barnett Bank of Pasco County¹ agrees with the Petitioner's statement.

SUMMARY OF ARGUMENT

Petitioner filed a notice of appeal from a judgment which had not been entered in compliance with Rule 54(b). Subsequent to that time, and before the appeal was dismissed, a Rule 54(b) Certificate was issued by the District Court. Petitioner infers, from the Circuit Court's dismissal of his appeal, that the court ruled that the subsequent issuance of a Rule 54(b) Certificate would not validate a notice of appeal filed after the entry of judgment, but before the entry of a Rule 54(b) Certificate, and suggests that this Court should exercise its certiorari jurisdiction because such a holding conflicts with the holdings of other circuit courts. However, the Eleventh Circuit's opinion does not even address the question of the District Court's late Rule 54(b) certification. Given that fact, and the fact that there may have been other grounds for the Eleventh Circuit's ruling, Barnett Bank would suggest to this Court that it is inappropriate to exercise its certiorari jurisdiction, where, in fact, no conflict may exist.

¹ Barnett Bank of Pasco County is a wholly owned subsidiary of Barnett Banks, Inc. Barnett Banks, Inc. is a publicly traded corporation whose address is Post Office Box 988, Jacksonville, Florida 32231. Barnett Bank of Pasco County has no subsidiaries. Barnett Bank of Pasco County will be hereinafter referred to as Barnett Bank.

Petitioner also suggests that Rule 4(a)(2), Fed.R.App.P., clearly applies to validate a premature notice of appeal when a Rule 54(b) Certificate is filed after that premature notice of appeal, but before the dismissal of the appeal. However, this Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Company*, ___ U.S. ___, 111 S.Ct. 648 (1991) indicates that Rule 4(a)(2) would not apply to the instant situation, where an announced ruling was followed immediately by the entry of judgment, and that judgment was not appealable at the time it was entered.

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' DISMISSAL OF PETITIONER'S APPEAL DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT BECAUSE IT DID NOT ADDRESS THE QUESTION OF WHETHER THE SUBSEQUENT ENTRY OF A RULE 54(b) CERTIFICATE WOULD SERVE TO RIPEN AND SAVE A PREMATURELY FILED NOTICE OF APPEAL.

This Court should not exercise its certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' dismissal of Petitioner's appeal because the opinion dismissing that appeal makes no statement conflicting with the decisions of any other circuits. Petitioner filed a notice of appeal from the District Court's judgment in favor of Barnett Bank and against him. That judgment did not determine all the claims in the case, and, while it was expressly directed by the court, the court had not stated

that there was no just reason for delay pursuant to Rule 54(b), Federal Rules of Civil Procedure.

Because the District Court subsequently entered a Rule 54(b) Certificate, prior to the Eleventh Circuit's dismissal of the case, the Petitioner infers that the Eleventh Circuit ruled that a Rule 54(b) certification is insufficient to validate a premature notice of appeal. That inference is not warranted.

Indeed, the decision of the Eleventh Circuit makes no statement about Rule 54(b) Certificates entered after the filing of a notice of appeal. The entire text of that *per curiam* dismissal is as follows:

This appeal is dismissed for lack of jurisdiction. The district court's order and judgment entered February 19, 1991, were not final and appealable because they failed to dispose of all the claims of all the parties to the action and the court failed to make an express determination that there was no just reason for delaying the entry of judgment. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *In re Yarn Processing Patent Validity Litigation*, 680 F.2d 1338 (11th Cir. 1982) (*per curiam*).

Barnett Bank respectfully suggests that this Court should not exercise its certiorari jurisdiction to cure a conflict which exists only by inference, and may not exist in fact. The decision of the Eleventh Circuit does not state that a subsequently entered Rule 54(b) Certificate would not validate a prematurely filed appeal, but simply states the uncontestable fact that the District Court's order and judgment entered February 19, 1991 were not final and appealable.

Thus, it may well be that the reasoning suggested by the Petitioner had no part in the Eleventh Circuit's dismissal of Petitioner's appeal. It is possible, for example, that the Eleventh Circuit determined that the reasons adduced by the District Court for its statement that there was no just reason for delay were inadequate. In its Rule 54(b) Certificate, the District court stated that there was no just reason for delay "for the reasons set forth in [Barnett Bank's] Motion for Final Judgment." Clearly, a Circuit Court may review a District Court's certification and determine that the District Court abused its discretion in certifying an appeal, and then dismiss that appeal. See, e.g., *Pahlavi v. Palandjian*, 744 F.2d 902 (1st Cir. 1984), *U.S. General, Inc. v. Albert*, 792 F.2d 678 (7th Cir. 1986).

Given the fact that the opinion of the Eleventh Circuit does not make any statement in conflict with the rulings of other circuit courts that a Rule 54(b) Certificate validates a prematurely filed notice of appeal and the fact that there may be alternate reasons for that decision, this Court should decline to exercise certiorari jurisdiction to cure a conflict which may not exist.

II. RULE 4(a)(2), FEDERAL RULES OF APPELLATE PROCEDURE, DOES NOT PROVIDE THAT A RULE 54(b) CERTIFICATE FILED AFTER THE ENTRY OF JUDGMENT AND A NOTICE OF APPEAL FROM THAT JUDGMENT WOULD VALIDATE THE PREMATURE NOTICE OF APPEAL.

Petitioner suggests that Rule 4(a)(2), Fed.R.App.P., mandates that the subsequent entry of a Rule 54(b) Certificate, after the filing of a premature notice of appeal,

- validates that notice of appeal. He supports that argument by citing this Court's opinion in *FirstTier Mortgage Co. v. Investors Mortgage Insurance Company*, ___ U.S. ___, 111 S.Ct. 648 (1991). However, the situation presented therein is not, contrary to Petitioner's statement, analogous to the instant case, and in fact, this Court's ruling in that case appears to negate Petitioner's argument. In that case, this Court stated the following:

In our view, Rule 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from a final judgment *only* when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. (emphasis supplied).

Clearly, that statement would exclude the instant situation. Here, the District Court announced a decision in its order of February 19, 1991 that *was immediately followed* by the entry of judgment, and Petitioner does not contest the fact that that judgment, as entered, was not an appealable judgment, because the court had not certified that there was "no just reason for delay."

Thus, *FirstTier* is completely inapplicable. The announced ruling was followed by the entry of judgment, and that judgment, nevertheless, was non-final at the time it was entered. Therefore, the Eleventh Circuit's ruling did not controvert Rule 4(a)(2).

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CONCLUSION

For the reasons set forth above, Barnett Bank requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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